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NOTES.

THE NATURE OF THE RIGHT OF ACTION ARISING FROM TORTIOUS INJURY TO FOREIGN REAL ESTATE.—The distinction between local and transitory actions which developed in the common law, although subjected to vigorous and continued criticism for over a century past,[1] has been steadfastly adhered to by the actual decisions[2] and the

[1]For example, by Lord Mansfield in Mostyn *v.* Fabrigas (1774) 1 Cowp. 161; by Chief Justice Marshall in Livingston *v.* Jefferson (1811) 15 Fed. Cas. 600, 1 Brock. 203; 22 Alb. L. J. 47 (1880); 21 Am. L. Reg. [N. s.] 604 (1882); by Prof. J. H. Beale in 26 Harvard Law Rev., 193, at p. 283 (1913); 80 Cent. L. J. 439 (1915); see 1 Wharton, Conflict of Laws, § 290a.

[2]Doulson *v.* Matthews (1792) 4 T. R. 503; Livingston *v.* Jefferson, *supra*; Dodge *v.* Colby (1888) 108 N. Y. 445, 15 N. E. 703; Bettys *v.* The Milwaukee & St. P. Ry. (1875) 37 Wis. 323; Morris *v.* Missouri Pac. Ry. (1890) 78 Tex. 17, 14 S. W. 228; Pittsburgh, C., C. & St. L. Ry. *v.* Jackson (1910) 83 Oh. St. 13, 93 N. E. 260; Kroll *v.* Chicago, B. & Q. R. R. (Neb. 1915) 152 N. W. 548; Montesano Lumber & Mfg. Co. *v.* Portland Iron Works (Ore. 1915) 152 Pac. 244.

extent of its application has been precisely determined. It may briefly be said that all actions are local, the gist of which is for tortious injuries to land[3] whether redress might be had in trespass *quare clausum fregit*[4] or would have to be sought through an action on the case.[5] With these have been grouped also those for breach of covenants running with the land as resting essentially upon privity of estate and being thereby so closely connected with the land that a breach of them partook of the same local character as an injury to the land itself.[6] All such actions, it was declared, could only be heard by courts of the jurisdiction in which the land in question was, and for a long time had to be tried even there within the very county of its location.

Simply saying that the controversy had a necessary connection with a particular locality did not, however, make clear whether the courts of another refused to listen to it because they thought that the right itself was equally circumscribed or merely because a procedural policy required it to be settled by the local tribunal. The New York Court of Appeals was recently called upon to decide which was the fundamental reason. Under a statute of 1913[7] that authorized him to maintain an action for injuries to land in another State, the plaintiff sought to recover for damages suffered before the passage of the Act. Since the statute was not expressly made retroactive[8] his claim rested upon the assertion that it dealt only with procedure[9] by allowing a remedy for a previously existent right. That the conception of a right legally existing although unenforcible was neither an impossible nor novel one to our law had already been demonstrated by the court in which this plea was put forward, when it recognized a married woman's right to the consortium of her husband by allowing her to sue for the alienation of his affections after the passage of a statute enabling

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[3]Ellenwood *v.* Marietta Chair Co. (1895) 158 U. S. 105, 15 Sup. Ct. 771; Ophir Silver Mining Co. *v.* Superior Court (1905) 147 Cal. 467, 82 Pac. 70. In only one common law jurisdiction has this rule been repudiated, Little *v.* Chicago, St. P., M. & O. Ry. (1896) 65 Minn. 48, 67 N. W. 846, and it may be doubted whether it would have been rejected there if the earlier case of British South Africa Co. *v.* Companhia de Moçambique, *infra*, had been brought to the attention of the court.

This note concerns itself only with actions in which a money judgment is sought and does not take account of those which are formally *in rem*, for it is universally conceded that such are truly local.

[4]Shelling *v.* Farmer (1726) 1 Str. *646; Allin *v.* Connecticut River Lumber Co. (1890) 150 Mass. 560, 23 N. E. 581.

[5]Warren *v.* Webb (1808) 1 Taunt. *379; Eachus *v.* Trustees (1856) 17 Ill. 534; Brisbane *v.* Pennsylvania R. R. (1912) 205 N. Y. 431, 98 N. E. 752.

[6]Clark *v.* Scudder (1856) 72 Mass. 122; White *v.* Sanborn (1833) 6 N. H. 220; Birney *v.* Haim (1822) 12 Ky. *262; see Henwood *v.* Cheeseman (Pa. 1817) 3 S. & R. *500; Tillotson *v.* Prichard (1887) 60 Vt. 94, 14 Atl. 302.

[7]N. Y. Code Civ. Proc., § 982a.

[8]The general rule is that statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears. 2 Lewis' Sutherland, Statutory Construction (2nd ed.) §§ 641, 642.

[9]In which case it would have affected all pending litigation or existing rights, *Ibid.*, § 674 and cases cited.

her to sue, but conferring on her no new substantive rights.[10] Moreover, all the criticism upon the classification among local actions of such a suit as the identical one before them had been to the effect that such classification was an unwarrantable denial of a remedy for the violation of a clearly existing right.[11] It was nevertheless held, in *Jacobus* v. *Colgate* (N. Y. Ct. of Appeals 1916) 54 N. Y. L. J. 2033, that the plaintiff could not recover.

The decision was, it is believed, an inevitable one; for however plausibly it may be argued that courts of law do possess the inherent power to award damages for injuries to foreign real estate,[12] the only logical conclusion from the manner in which they dealt with such local actions is that they did not deem themselves to have that power. The objection that the venue had been laid in the wrong county was one that might be raised by demurrer or urged in defense under the general issue,[13] but that the jurisdiction was there arbitrarily confined to a particular county court and was not essentially lacking in all the others is evident from the fact that if the defendant failed to object in time his right to do so was lost and a perfectly valid judgment might be entered against him.[14] If, however, the land were altogether outside of the state the court was absolutely without power to proceed,[15] and a suit when brought in the wrong federal district would be dismissed by the court of its own motion.[16] And when, after the abolition of all local venues in England compensation was asked there for injuries to land in South Africa, it was held by the House of Lords, reversing the Queen's Bench Division,[17] that technical rules had never stood in the plaintiff's way and that no right of action existed in England for him to enforce.[18] Equity has also followed the law by

[10]Bennett *v.* Bennett (1889) 116 N. Y. 584, 23 N. E. 17. The same position has been taken by courts of other states. Sims *v.* Sims (1910) 79 N. J. L. 577, 76 Atl. 1063; see Smith *v.* Smith (1897) 98 Tenn. 101, 38 S. W. 439; but *cf.* Wood *v.* Vernon (1887) 13 Del. 48, 12 Atl. 656.

[11]". . . the distinction which produces the inconvenience of a clear right without a remedy." Livingston *v.* Jefferson and other citations in note 1, *supra.*

[12]11 Columbia Law Rev., 262; 15 *id.* 169.

[13]Hathorne *v.* Haines (1821) 1 Me. *238; see Birney *v.* Haim, *supra*; Blackford *v.* Lehigh Valley R. R. (1890) 53 N. J. L. 56, 20 Atl. 735. To the fact that a suit could be stopped in the same way if the trespass occurred beyond the realm, see Mayor of London *v.* Cox (1867) L. R. 2 H. L. 239 at p. 261, may doubtless be attributed the failure of many critics to recognize the fundamental difference between the two situations.

[14]Birney *v.* Haim, *supra*; Blackford *v.* Lehigh Valley R. R., *supra*; Gillen *v.* Illinois Central Ry. (1910) 137 Ky. 375, 125 S. W. 1047; Woolf *v.* McGaugh (1911) 175 Ala. 299, 57 So. 754; *cf.* Allin *v.* Connecticut River Lumber Co., *supra*; British South Africa Co. *v.* Companhia de Moçambique, *infra.*

[15]Whitaker *v.* Forbes (1875) L. R. 10 C. P. 583, affd. (1875) 1 C. P. D. 51; Brisbane *v.* Pennsylvania R. R. *supra*; Karr *v.* New York Jewell Filtration Co. (1908) 78 N. J. L. 198, 73 Atl. 132; Montesano Lumber & Mfg. Co. *v.* Portland Iron Works, *supra.*

[16]Ellenwood *v.* Marietta Chair Co., *supra.*

[17]Companhia de Moçambique *v.* British South Africa Co. (1892) L. R. 2 Q. B. 358.

[18]British South Africa Co. *v.* Companhia de Moçambique [1893] A. C. 602.

refusing to enjoin trespasses to land outside of the jurisdiction.[18] So for no purpose whatever was the right of action arising from a tortious injury to foreign real estate recognized as existing outside of the jurisdiction where the land was situated. The right was considered to be limited as is one depending wholly on a foreign statute, and although many such are given effect upon grounds of comity,[20] yet when an action on them is for the first time authorized by statute, such statute is held not to be retroactive for the same reason as was the one in the principal case.[21]

LEGAL DAMAGES IN EQUITY IN LIEU OF SPECIFIC PERFORMANCE.—The theory upon which equity awards damages in cases of specific performance is entirely different from that upon which it grants compensation. The grant of compensation is an equitable function incidental to specific performance, which is exercised in order that the equitable relief may be complete. But the award of damages is in lieu of specific performance and is the giving of a legal remedy.[1] It must

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[18]Northern Indiana R. R. *v.* Michigan Central R. R. (1853) 56 U. S. 233; Columbia National Sand Dredging Co. *v.* Morton (1906) 28 App. D. C. 288; Ophir Mining Co. *v.* Superior Court, *supra*; The Salton Sea Cases (C. C. A. 9th 1909) 172 Fed. 792, 812-816; 2 Columbia Law Rev., 51. The only cases *contra* are ones in which the main question involved was the enforcement of contract obligations and the injunction was granted incidentally thereto without consideration of the inherent difference in the nature of the relief. Great Falls Mfg. Co. *v.* Worster (1851) 23 N. H. 462; Alexander *v.* Tolleston Club (1884) 110 Ill. 65; Jennings Bros. & Co. *v.* Beale (1893) 158 Pa. 283, 27 Atl. 948; Harris *v.* Lumpkin (1911) 136 Ga. 47, 70 S. E. 869; Sutphen *v.* Fowler (N. Y. 1841) 9 Paige 280; see Carroll *v.* Lee (Md. 1832) 3 Gill. & J. 504. The lead of Chancellor Walworth in Sutphen *v.* Fowler, *supra*, does not seem to have followed or approved in New York since; see People *v.* Central R. R. of New Jersey (1870) 42 N. Y. 283; Atlantic & Pacific Telegraph Co. *v.* Baltimore & Ohio R. R. (1880) 46 N. Y. Super. Ct. 377, s. c. (1882) 87 N. Y. 355.

[20]See 26 Harvard Law Rev., 172.

[21]Fairclough *v.* Southern Pacific Co. (App. Div., 1st Dept. 1916) 54 N. Y. L. J. 2215.

[1]See Pomeroy, Specific Performance (2nd ed.) § 436. Equity generally grants compensation where a contract to convey land can be only partially performed because of some deficiency in the amount of or in the title of the vendor's estate, Pomeroy, Specific Performance (2nd ed.) § 434, unless the vendee knew at the time of the contract the nature and extent of the vendors's property. See Peeler *v.* Levy (1875) 26 N. J. Eq. 330. But equity is reluctant to give compensation where it cannot be computed with any degree of certainty. This is particularly true where a vendor has been unable to secure a release of his wife's dower, because dower is dependent upon the contingency of the survivorship of the wife. Humphrey *v.* Clement (1867) 44 Ill. 299; Reisz's Appeal (1873) 73 Pa. 485. A further reason for refusing compensation is the fact that the wife may be coerced through fear or affection to give up her dower rights. Aipel etc. Real Estate Co. *v.* Spelbrink (1908) 211 Mo. 671, 111 S. W. 480. Some courts do allow abatement in the purchase price for dower but the decisions do not clearly show how the value is determined, Sanborn *v.* Nockin (1873) 20 Minn. 178; Walker *v.* Kelly (1892) 91 Mich. 212, 51 N. W. 934, although in some instances it seems to be by use of the mortality tables. See Woodbury *v.* Luddy (1867) 96 Mass. 1; Sternberger *v.* McGovern (1875) 56 N. Y. 12. The contingency of survivorship makes such a method nothing